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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1958**

**No. 520**

VIRD O. CUDD,

*Appellant,*

*vs.*

GALE A. MATHERS, Judge of the Ninth Judicial Circuit of the State of Illinois,

*Appellee.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

# BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

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## BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

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Appellee has moved to dismiss this appeal upon three grounds, which will be dealt with in this brief separately and in the order in which they were raised in the motion.

### I

### Denial by the Supreme Court of Illinois of Leave to File a Petition for Mandamus in This Case Constitutes an Appealable Judgment

Appellee maintains that the order of the Illinois supreme court denying appellant leave to file a petition for writ of mandamus is not an appealable judgment because under

state law it is not an adjudication upon the merits. In this argument, appellee errs not only in assuming that an adjudication upon the merits is necessary to constitute an appealable judgment but also in assuming that the order of the supreme court in this case was not an adjudication upon the merits.

The statute defining the appellate jurisdiction of this Court, 28 U.S.C. § 1257 (1952), nowhere requires that a judgment being appealed be a decision on the merits. The only requirement is that the action of the court, whether or not decisive of the merits, effectually terminate the particular case and prevent the appellant from further prosecuting the same. *Wilson v. Republic I. & S. Co.*, 257 U.S. 92, 96 (1921). As stated in *Detroit & M. R. Co.* v. *Michigan R. Comm.*, 240 U.S. 564, 571 (1916):

> This view has prevailed through a century of practice in reviewing judgments and decrees dismissing causes for want of jurisdiction or for other reasons not decisive of the merits.

In the instant case, the denial by the state supreme court of leave to file a petition for mandamus effectually terminated appellant's right to have expunged the trial court order requiring him to furnish information about his insurance coverage. Appellant could not appeal from the order of the trial court because it was interlocutory, and he could not bring mandamus against the trial judge in his own court. He had no remedy other than an original petition for mandamus in the state supreme court, and the denial of leave to file such a petition, regardless of the reason therefor, finally determined his claim of right.

Although not decisive of appealability, the denial of leave in this case was in fact an adjudication upon the merits. Appellant concedes that denial of leave to petition

for mandamus by the Illinois supreme court is not necessarily an adjudication of the merits. The case of *Monroe* v. *Collins*, 393 Ill. 553, 557, 66 N.E. 2d 670, 672 (1946), relied on in appellee's motion to dismiss, cites instances in which the denial may be for reasons other than a decision upon the merits. Nevertheless, a reference to the prior case of *People* ex rel. *Terry* v. *Fisher*, 12 Ill. 2d 231, 145 N.E. 2d 588 (1957) makes it clear that denial of leave in this case was of necessity an adjudication upon the merits.

The *Terry* case involved the identical question at issue in this case. Leave to petition for mandamus was requested and granted, and a decision was rendered on the merits denying the writ of mandamus. The only reason for denying leave to petition for mandamus in this case not present in the *Terry* case was that in this case a decision on the merits had already been rendered. It is obvious that the court's perfunctory judgment without opinion denying leave to petition for mandamus was merely an approval of the previous decision on the merits. In fact, appellee concedes as much in part III of his motion to dismiss when he argues that the holding of the Illinois supreme court in this case was based upon the state "substantive law" recited in the *Terry* case.

## II

### Lee H. Van Tuyl Has Been Served with Notice of Appeal, Even Though He Is Not a Party to This Action and Therefore Not Required to Be Served

Appellee maintains that the appeal should be dismissed because appellant has failed to serve the notice of appeal on Lee H. Van Tuyl, the adverse party in the negligence action of *Cudd* v. *Van Tuyl* in the Illinois trial court out of which this mandamus action arose. The best answer to this contention is that it is not true. The certificates of service on the notice of appeal show that Van Tuyl was

served (R. 255-56). Moreover, although appellee has raised no question about service of the jurisdictional statement, and although the certificate attached thereto does not show service on Van Tuyl, he was in fact served with the jurisdictional statement at the same time as appellee, and he has been served with this brief as well. Appellant is not seeking to hide the fact of appeal from any person who might be interested.

Although Van Tuyl has in fact been served with all papers in this appeal as a matter of courtesy, he was not required to be served. The rules of this court require service only on the "parties" to a suit. U.S. Sup. Ct. R. 10(2), 33(1). This is an appeal of a mandamus action to which Van Tuyl was not a party. A proceeding in mandamus is an "independent adversary suit." *Detroit & M. R. Co.* v. *Michigan R. Comm.* 240 U.S. 564, 571 (1916).

Appellee concedes that the correct Illinois procedure in mandamus cases of this sort is just what appellant has done, impleading only the trial judge whose order is sought to be expunged. It cannot be thought that this Court would allow an appellant to be barred from obtaining relief for a final deprivation of federal rights in a state case because he followed the recognized procedure provided by the state in the case. Such a holding would allow a state by its procedure to bar an appeal to this Court.

## III

### Appellee's Arguments That This Appeal Presents No Substantial Federal Question Are Without Merit

Appellee concedes that there is a diversity of judicial opinion as to whether a party may be compelled by pretrial discovery to disclose the existence and, if existent, the coverage of public liability insurance. This alone shows that the question is substantial. Actually, there are many

more cases on each side of this important question than those cited in the *Terry* case and referred to by appellee. A larger group of decisions is cited in the suggestions in support of appellant's motion for leave to file petition for mandamus which were filed with the Illinois court (R. 148-52), and there are even others to exemplify the national urgency of the question raised in this Court, *e.g.*, *Roembke* v. *Wisdom*, 22 F.R.D. 197 (S.D. Ill. 1958).

But appellee argues that there is no federal question because the holding was based on state "substantive law as recited in the *Terry* case." Regardless of whether the grounds for the decision in the *Terry* case be labeled "substantive law," it is obvious that the court in that case and in this could not have held as it did without deciding against the contention, earnestly pressed, that to compel the disclosure of insurance coverage violates federal constitutional rights. In fact, the opinion in the *Terry* case indicated that the constitutional question was passed on. *People* ex rel. *Terry* v. *Fisher*, 12 Ill. 2d 231, 240, 145 N.E. 2d 588, 594 (1957). It is to correct the error of the decision on a federal question that this appeal is being taken.

Appellee's arguments directed at the constitutionality of the compulsory disclosure of insurance coverage require only brief reply:

Appellee argues that disclosure of insurance coverage may be required even though it is not admissible evidence at trial because this Court's own federal rules of civil procedure allow pre-trial examination "regarding any matter, not privileged, which is relevant to the subject matter involved in the action" and state that "it is not a ground for objection that the testimony will be inadmissible in the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence." FED. R. CIV. P. 26(b). Appellant readily concedes that the rules

made by the Illinois supreme court for discovery are almost identical with the statutory federal discovery rules. But appellee errs in assuming that disclosure of insurance coverage could be compelled under the federal rules. Evidence of insurance coverage is neither "relevant to the subject matter" involved in a negligence action, nor is it "reasonably calculated to lead to the discovery of admissible evidence." The federal courts, including two federal courts in Illinois, have consistently rejected all efforts to compel insurance disclosure under rule 26. *Roembke* v. *Wisdom*, 22 F.R.D. 197 (S.D. Ill. 1958); *Gallimore* v. *Dye*, 21 F.R.D. 283 (E.D. Ill. 1958); see also cases treated in suggestions in support of appellant's motion for leave to file petition for mandamus (R. 148 52).

Appellee also argues that Illinois law might provide for direct joinder of an insurance company as a party in a negligence action, thus conceding that the law has not done so. Nor has Illinois law made public liability insurance compulsory, except after particular kinds of accidents. Whether or not Illinois law could provide for direct joinder of an insurer without a violation of federal constitutional rights is a question which has not been decided. The unsupported assumption that such joinder could validly be provided for is certainly no basis for the conclusion that compulsory disclosure of insurance coverage does not violate federal constitutional rights.

Finally, appellee argues that compulsory disclosure of insurance does not deny equal protection of the laws because the Illinois court has placed public liability insurance in a "category" distinct from an insured's other assets. But appellee fails to show any reasonable basis for this discrimination against the holders of that particular category of property. Instead, appellee argues that equal protection is afforded because everyone in the particular

class is discriminated against. The same reasoning would justify imposition of a similar pre-trial penalty equally upon all who chance to be rich, or poor, or members of a particular race, or of a particular church or lodge.

**Conclusion**

For the reasons set forth above and in the jurisdictional statement, it is urged that the motion to dismiss this appeal be overruled as without merit, and that probable jurisdiction of this appeal be noted.

Respectfully submitted,

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and
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